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No. 92-1695

Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, *ex rel.*
KREINDLER & KREINDLER,

Petitioner,

—v.—

UNITED TECHNOLOGIES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL AND REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIORARI

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SUPPLEMENTAL AND REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Kreindler & Kreindler, submits this supplemental and reply brief in further support of its Petition for Writ of Certiorari.

Respondent United Technologies Corporation has brought to the Court's attention a proposed amendment affecting the very False Claim Act statute in question on this appeal, 31 U.S.C. § 3730(e)(4), but mischaracterizes the import of this proposed amendment to this litigation.

The proposed legislation and supporting statement of Senator Grassley proves error was committed below and supports the grant of certiorari. Alternatively, this Court may stay consideration of this Petition pending Congressional and Presidential action on the proposed legislation.

On April 29, 1993, after the Petition for Writ of Certiorari was filed, United States Senator Grassley, the author of the 1986 False Claims Act Amendments, introduced bill S.841 to amend the False Claims Act.[1] Contrary to Respondent's claim, Senator Grassley's statement explaining the purpose of the proposed amendments demonstrates that the court below erred in dismissing Petitioner's *qui tam* suit for lack of subject matter jurisdiction under Section 3730(e)(4):

> This section clarifies the Act's application to suits where the government is already conducting an open active investigation and suits based on information acquired in the course of government employment.
>
> Parasitic lawsuits: The Act deletes the existing jurisdictional bar on suits based on information publicly disclosed in a criminal, civil, or administrative hearing, audit, or investigation or in a news media report. . . . *The existing bar was intended to prohibit only those suits where the government is already conducting an investigation and a qui tam lawsuit can bring no new information to the government's attention. That section has been wrongly interpreted by a number of courts to bar suits based on information no [sic] subject of a government investigation.*

S.App. 8a-9a (emphasis added).

It is evident that Respondent is incorrect to claim that "Senator Grassley *now* believes [Section 3730(e)(4)] is 'overly broad' " and that Petitioner's arguments in the Second Circuit and on this Petition are a "contrived interpretation" of the public disclosure bar which lack any support in the legislative history. Respondent's Brief in Opposition, p. 13-14 (emphasis added).

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1 The pages of the Congressional Record containing the text of S.841 and the explanatory statement of Senator Grassley are reprinted in the Supplemental Appendix. References to this Appendix will be prefaced by "S.App."

It is a doctrine of this Court that in disposing of cases before it, this Court must

> makes such disposition as justice may require. 'And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.'

Ashcraft v. State of Tennessee, 322 U.S. 143, 156 (1944), quoting *Patterson v. Alabama*, 294 U.S. 600, 607 (1935).

The introduction of bill S.841 and its clarification of the intent and scope of present Section 3130(e)(4) is a new fact which has intervened since the decision of the Second Circuit and directly supports Petitioner's request for a writ of certiorari to correct the error below.

Alternatively, it is respectfully submitted that this Court stay consideration of this petition for a reasonable length of time pending Congressional and Presidential action on the proposed bill. The bill provides for the deletion of Section 3730(e)(4)(A) and adds new text giving only the government the right to move to dismiss actions for lack of jurisdiction when the *qui tam* suit is based on allegations from an open and active government fraud investigation.

The bill expressly provides that the amendment to Section 3130(e)(4) is to apply to "pending" cases. S.841, Section 8, S.App. 8a.

A case pending on appeal or on a writ of certiorari is "pending" for purposes of retroactive application of an amended statute, and this Court must apply the law in effect at the time it renders its decision, unless manifest injustice would result or there is a statutory direction to the contrary. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-282 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801).

The express provision in the bill for retroactive application to "pending" cases, together with the statement of Senator Grassley that the amendments were prompted by erroneous court interpretations, supplies the necessary proof that Petitioner Kreindler would be entitled to application of the new amendments, once enacted. The only manifest injustice which would result is for Petitioner's suit to be wrongly dismissed when there was clear error by the Second Circuit in construing Section 3730(e)(4) and when legislation has been proposed to rectify that error.

Upon enactment of the bill, it is requested that this Court grant certiorari, reverse the judgment of dismissal based on the amended law and remand for further proceedings consistent therewith. Alternatively, it is requested that this Court grant certiorari now to correct the error below.

CONCLUSION

For the reasons stated herein, it is requested that this Court grant a Writ of Certiorari or stay the consideration of this Petition for a reasonable length of time.

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SUPPLEMENTAL APPENDIX

S. 841. A bill to amend chapter 37 of title 31, United States Code, relating to false claims actions, and for other purposes; to the Committee on the Judiciary.

THE FALSE CLAIMS ACT AMENDMENTS OF 1993

Mr. GRASSLEY.

Mr. President, I rise this morning to introduce a package of housekeeping amendments to the taxpayers' most effective tool in fighting fraud—the FALSE CLAIMS ACT. This act, sometimes called the Abe Lincoln Law after its creation in 1863 to combat fraud by civil war profiteers, allows private citizens with knowledge of fraud on the government to sue in the name of the Government, in return for a share in the recovery.

This unique mechanism for fighting fraud, the qui tam lawsuit, has been employed in Anglo-American law since the middle ages to help the Government protect its interests. Just last year, a quarter-billion dollars was recovered in qui tam lawsuits. That doubled the total recoveries in the past 6 years to nearly a half-billion. The taxpayers now recover more money through qui tam lawsuits than they do through fraud lawsuits initiated by the Justice Department.

The act has been especially effective in fighting defense contract fraud, particularly since it was amended in 1986 by Representative BERMAN and myself. In just two cases last year the Government recovered $125 million dollars from two defense contractors for contract fraud, including services billed to the Government but never performed. In another case, still pending, a whistleblower has alleged hundreds of millions of damages for fraud by the Teledyne Corp., which resulted earlier this year in the debarment of Teledyne relays for 1 year.

Qui tam is also proving an exceptionally useful tool for fighting health care fraud. In a case settled last December, one of the Nation's largest health labs agreed to pay $110 million for unnecessary medical tests billed to Medicare and the Defense Department's health insurance program—the largest ever recovery in a qui tam case. The practice in that case—conducting a series of expensive and unnecessary tests whenever

a physician requests a routine blood test, and then billing the cost to the Government—is apparently common in the industry, and a number of labs are currently under investigation.

As with any statute, the FALSE CLAIMS ACT is subject to interpretations by the courts which are contrary to congressional intent. The bill I am introducing today will clarify several issues that have come up in litigation under the 1986 amendments. The bill creates strict limitations on the right of Government employees to file qui tam lawsuits. It eliminates the general jurisdictional bar on a broad category of lawsuits based on publicly disclosed information, creating instead a right of the Government to dismiss parasitic lawsuits based on information derived from an open and active Government fraud investigation. The act further clarifies that the 1986 amendments were intended to apply retroactively, and makes several other clarifications to the act.

I look forward to prompt hearings on this matter in the Judiciary committee. I also look forward to constructive assistance in passing these amendments and administering the act, from the Justice Department and the Clinton administration. The Justice Department in the past has exhibited a hostility to whistleblower lawsuits, but Attorney General Reno has pledged to reexamine the Department's policy on qui tam. I hope to hear of a favorable review after the President installs a staff to assist the Attorney General in the administration of justice.

Representative BERMAN in the House of Representatives is introducing companion legislation like I am introducing today. He and I worked together in 1986 when we beefed up the qui tam provisions of law that have been on the books since 1863 so it would be a more effective piece of legislation. I hope that between Representative BERMAN and myself we can get both bodies to move quickly to make these necessary housekeeping changes in the Government's most effective tool in fighting fraud.

I ask unanimous consent, Mr. President, that the bill and summary of its contents be printed in the RECORD.

There being no objection, the material was ordered to be printed in the Record, as follows:

S. 841

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

*S5180 SECTION 1. SHORT TITLE.

This Act may be cited as the "False Claims Amendments Act of 1993".

SEC. 2. GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

Section 3730(b) of title 31, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) No later than 60 days after the date of service under paragraph (2), the Government may move to dismiss from the action the qui tam relator if—

"(i) all the necessary and specific material allegations contained in such action were derived from an open and active fraud investigation by the Government; or

"(ii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, and none of the following has occurred:

"(I) In a case in which the employing agency has an inspector general, such person, before bringing the action—

"(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to such inspector general; and

"(bb) notified in writing the person's supervisor and the Attorney General of the disclosure under division (aa).

"(II) In a case in which the employing agency does not have an inspector general, such person, before bringing the action—

"(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed, to the Attorney General; and

"(bb) notified in writing the person's supervisor of the disclosure under division (aa).

"(III) Twelve months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosure of information and notification under either subclause (I) or (II) were made and the Attorney General has not filed an action based on such information.

"(B) Prior to the expiration of the 12-month period described under subparagraph (A)(ii)(III) and upon notice to the person who has disclosed information and provided notice under subparagraph (A)(ii) (I) or (II), the Attorney General may file a motion seeking an extension of such 12-month period. Such 12-month period may be extended by a court for not more than an additional 12-month period upon a showing by the Government that the additional period is necessary for the Government to decide whether or not to file such action. Any such motion may be filed in camera and may be supported by affidavits or other submissions in camera.

"(C) For purposes of subparagraph (A), a person's supervisor is the officer or employee who—

"(i) is in a position of the next highest classification to the position of such person;

"(ii) has supervisory authority over such person; and

"(iii) such person believes is not culpable of the violation upon which the action under this subsection is brought by such person.

"(D) A motion to dismiss under this paragraph shall set forth documentation of the allegations, evidence, and information in support of the motion.

"(E) Any person bringing a civil action under paragraph (1) shall be provided an opportunity to contest a motion to dismiss under this paragraph. The court may restrict access to the evidentiary materials filed in support of the motion to dismiss, as

the interests of justice require. A motion to dismiss and papers filed in support or opposition of such motion shall not be—

"(i) made public without the prior written consent of the person bringing the civil action; and

"(ii) subject to discovery by the defendant.

"(F) If the motion to dismiss under this paragraph is granted, the matter shall remain under seal.

"(G) No later than 6 months after the date of the enactment of this paragraph, and every 6 months thereafter, the Department of Justice shall report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives relating to—

"(i) the cases in which the Department of Justice has filed a motion to dismiss under this paragraph;

"(ii) the outcome of such motions; and

"(iii) the status of false claims civil actions in which such motions were filed.".

SEC. 3. PROVISIONS RELATING TO ACTIONS BARRED AND QUI TAM AWARDS.

Section 3730 of title 31, United States Code, is further amended (1) in subsection (b)(1) by adding at the end thereof "No claim for a violation of section 3729 may be waived or released by any action of any person, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section.";

(2) in subsection (d)—

(A) in the first sentence by striking out ", subject to the second sentence of this paragraph,"; and

(B) by striking out the second sentence; and

(3) in subsection (e) by striking out paragraph (4).

SEC. 4. WHISTLEBLOWER PROTECTION.

Section 3730(h) of title 31, United States Code, is amended—

(1) by striking out "(h)" and inserting in lieu thereof "(h) WHISTLEBLOWER PROTECTION.—(1)"; and

(2) by adding at the end thereof the following new paragraphs:

"(2)(A) In any action brought by an employee under paragraph (1), the employee shall be entitled to relief if, based upon a preponderance of the evidence, the employee demonstrates that a lawful act described under paragraph (1) was a contributing factor in the action by the employer against the employee that is alleged in the complaint.

"(B) Notwithstanding the provisions of subparagraph (A), such employee shall not be entitled to relief, if the employer demonstrates by clear and convincing evidence that the employer would have taken the same action against the employee in the absence of such lawful act.".

SEC. 5. DEFINITION OF PERSON.

Section 3730 of title 31, United States Code, is further amended by inserting at the end thereof the following new subsection:

"(i) DEFINITION.—For purposes of this section the term 'person' means any natural person, partnership, corporation, association, or other legal entity including any State or political subdivision of a State.".

SEC. 6. STATUTE OF LIMITATIONS.

Section 3731(b) of title 31, United States Code, is amended to read as follows:

"(b)(1) A civil action under section 3730 may not be brought more than 6 years after the date on which the violation of section 3729 is committed.

"(2) For the purpose of computing the period described under paragraph (1), there shall be excluded all periods during

which facts material to the right of action are not known and reasonably could not be known by the official of the United States with authority to act in the circumstances.".

SEC. 7. AUTHORITY TO ISSUE INVESTIGATIVE DEMANDS.

Section 3733 of title 31, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in the matter preceding subparagraph (A) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and

(B) in the matter following subparagraph (D)—

(i) in the first sentence by inserting "or an Assistant Attorney General" after "Attorney General"; and

(ii) in the second sentence by striking out ", the Deputy Attorney General,":

(2) in subsection (a)(2)—

(A) in subparagraph (F) by striking out "designated by the Attorney General"; and

(B) in subparagraph (G) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears;

(3) in subsection (h)(6) by striking out ", the Deputy Attorney General,";

(4) in subsection (i) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and

(5) in subsection (l)(6) by inserting "or an Assistant Attorney General" after "Attorney General".

SEC. 8. APPLICABILITY AND EFFECTIVE DATE.

(a) IN GENERAL.—(1) The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to cases filed on or after the date of enactment of this Act.

(2) The provisions of section 3730(b)(6)(A)(i) of title 31, United States Code (as added by section 2 of this Act), and section 3730 (d) and (e) of such title (as amended by section 3 (2) and (3) of this Act), shall apply to cases pending on the date of the enactment of this Act. In any case that is pending on the date of the enactment of this Act in which the Government has elected to proceed with the action under section 3730(b)(4) of title 31, United States Code, the Government may file a motion to dismiss a qui tam relator under section 3730(b)(6)(A)(i) of such title (as added by section 2 of this Act), no later than 120 days after the date of the enactment of this Act.

(b) PRIOR LAWS.—(1) The amendments made by the False Claims Amendments Act of 1986 (Public Law 99-562) shall apply to cases filed on or after the date of the enactment of such Act, and to cases pending on such date that are still pending on the date of the enactment of this Act.

(2) The amendments made by section 9 of the Major Fraud Act of 1988 (Public Law 100-700) shall apply to cases filed on or after the date of the enactment of such Act, and to cases pending on such date that are still pending on the date of enactment of this Act.

SUMMARY OF S. 841, THE FALSE CLAIMS ACT AMENDMENTS OF 1993

SECTION 1.

Popular title.

SECTION 2: GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

This section clarifies the Act's application to suits where the government is already conducting an open and active investigation and suits based on information acquired in the course of government employment.

Parasitic lawsuits: The Act deletes the existing jurisdictional bar on suits based on information publicly disclosed in a criminal, civil, or administrative hearing, audit, or investigation, or in a news media report. 1 The current jurisdictional bar was created in 1986 *S5181 as a replacement for the overly broad bar on any qui tam suit based on information in the possession of the government. The existing bar was intended to prohibit only those suits where the government is already conducting an investigation and a qui tam lawsuit can bring no new information to the government's attention. That section has been wrongly interpreted by a number of courts to bar suits based on information no [sic] subject of a government investigation. 2 Moreover, although the jurisdictional bar is designed to protect the fiscal interests of the United States, it has instead become a common basis of uninterested defendants' arguments for dismissal of otherwise meritorious fraud complaints.

The amendments therefore eliminate the jurisdictional bar and replace it with a simplified right of the government to dismiss parasitic lawsuits—suits derived from open and active fraud investigations by the government. The Act's absolute jurisdictional bar on qui tam actions based upon information already the subject of a civil suit by the government is retained.

Government employee lawsuits: Following the lead of legislation passed by the House of Representatives last year, Representative Berman's H.R. 4563, the Amendments address the Act's ambiguity about qui tam lawsuits by government employees. A number of courts have concluded that the Act does not preclude such suits. 4 Recognizing that government employees may have an improper conflict of interest if granted an unrestrained right to sue for fraud discovered in the course of their employment and collect a portion of the government's damages—especially employees whose primary job responsibilities include investigating and prosecuting fraud, the Amendments require employees to report fraud to the government (their agency's inspector general, their supervisor, and the attorney general), and grant the government 12 months to file an action based on the information, before they can file a qui

tam suit. The government is granted the right to dismiss qui tam suits which do not meet these requirements.

The government must report every six months to the Judiciary Committees on motions under this section and the status of actions in which such motions were filed.

SECTION 3

Subsection 1 amends the Act to clarify that private parties cannot waive the government's rights under the FALSE CLAIMS ACT as part of any private settlement of a potential qui tam suit.

Subsection 2 strikes those sections of the current act which are made redundant by the amendments in section 2.

SECTION 4

This section clarifies that the whistleblower protection provisions of the current act should utilize the same standards as the Whistleblower Protection Act. This amendment passed the House last year as part of H.R. 4563.

SECTION 5

Section 5 clarifies the definition of "person" in the Act, which includes entities other than natural persons (other than the federal government), and pluralities of persons.

SECTION 6

Section 6 clarifies that the 6 year statute of limitations under the Act is tolled in those periods where the government had not and reasonably could not have discovered the fraud.

SECTION 7

Section 7 clarifies that certain mid-level officers of the Department of Justice have the authority to issue civil investigative demands.

SECTION 8

Section 8 addresses the effective date of the amendments. The amendments apply to cases filed after passage, except for the deletion of section 3730(e)(4)(A) and the new government right to dismiss actions based on information derived from open and active government fraud investigations, which apply to pending cases.

The bill also clarifies that the 1986 and 1988 amendments to the Act are intended by Congress to apply retroactively.